A

SN Akmida Holdings Sdn Bhd v Ahmad Zaki Sdn Bhd

B HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO WA-24C(ARB)-50–11 OF 2019
LIM CHONG FONG J
21 JANUARY 2020

C *Contract — Performance bond — Injunction — Subcontractor who took out performance bond and advance payment guarantee in favour of main contractor sought interim injunction to prevent latter from receiving payments under the bond and guarantee pending completion of arbitration proceedings — Clause in subcontract provided that main contractor could not utilise monies under the bond* D *and guarantee unless main contractor's employer had certified that subcontractor had breached subcontract — Whether in absence of such certificate main contractor could not receive payments under the bond and guarantee — Whether main contractor's demand for payment under the bond and guarantee were therefore premature and invalid*

E

Pursuant to a tripartite agreement between the defendant, MRTC and PDP, the defendant was appointed as the works contractor to carry out and complete a mass rapid transit project. By a subcontract between the defendant and the plaintiff, the latter was appointed as PDP's nominated subcontractor to carry F out part of the works in the project. In compliance with the subcontract, the plaintiff took out an on-demand performance bond and advance payment guarantee ('the bond and the guarantee') in favour of the defendant. Clauses 25.2(a) and 26.7 of the subcontract forbade the defendant from utilising any monies under the bond and guarantee unless PDP had issued to G the defendant (with a duplicate copy to the plaintiff) a certificate stating that the plaintiff had committed a breach of the subcontract. Growing disputes between the parties over alleged delays in completion of works, non-payment of interim certificates, et cetera, came to a head when the defendant terminated the subcontract and demanded for payment under the bond and guarantee. H The plaintiff disputed the validity of the termination and referred all disputes and differences between the parties to arbitration. In addition, the plaintiff filed the instant originating summons ('OS'), inter alia, for interim injunctions to be issued to prevent the defendant from receiving payment under the bond and guarantee and to preserve the status quo until the arbitration proceedings I were concluded. At the hearing of the OS, the plaintiff argued that the termination of the subcontract was unlawful and mala fide and that it was unconscionable for the defendant to demand payment under the bond and guarantee before the disputes between the parties had been decided at the arbitration. The defendant, on the other hand, maintained that the

termination was lawful because, inter alia, the plaintiff's failure to adhere to timelines of completion threatened to make the defendant liable to pay massive liquidated and ascertained damages to PDP.

Held, granting the injunctions:

(1) Clauses 25.2(a) and 26.7 of the subcontract provided that the defendant could not utilise payments under the performance bond and the advance payment guarantee without PDP's issuance of a written certificate to the defendant (with a copy extended to the plaintiff) that the plaintiff had defaulted in its obligations under cll 25.1 and 26.6 of the subcontract. There was no evidence of any such written certificate issued by PDP for these purposes. The Court of Appeal in *Kejuruteraan Bintai Kindenko Sdn Bhd v Nam Fatt Construction Sdn Bhd & Anor* (which decision bound this court) held that such a certificate as aforesaid was a condition precedent to the right to demand against a performance bond and that in the absence of the certificate the demand was premature. The defendant's demands on the bond and the guarantee were similarly premature and invalid. The defendant had to await the decision in the arbitration before the monies under the bond and the guarantee could be encashed (see paras 42–43 & 53).

(2) The defendant's contention that cll 25.2(a) and 26.7 merely prevented it from utilising the encashed monies but not the encashment of the payment itself was an artificial proposition that was manifestly unfair because the plaintiff would be prejudiced by having to indemnify the bank if it paid out under the bond and the guarantee (see para 43).

(3) The parties acknowledged that the defendant owed the plaintiff RM15,773,980.20 (comprising unpaid interim certificates and other uncertified claims) whilst the defendant claimed it was entitled to a set off of RM73m as liquidated and ascertained damages ('LAD') that it might have to pay PDP for anticipated non-fulfillment of key dates under its works contract. The computation of the LAD figure by the defendant was arbitrary and speculative and assumed that the plaintiff was wholly liable for it. The defendant's tabulation of the sum was too simplistic and lacked cogency. Although the defendant had exhibited warning notices it received from PDP threatening to impose LAD, they were in themselves inadequate to justify the set off. It was therefore sensible that cl 25.2(a) required PDP's certification before monies under the performance bond could be utilised so as to avoid unjustified claims by the defendant against the plaintiff such as for late completion of work where the delay could have been caused or contributed to by the defendant itself (see paras 44–46).

(4) Since the defendant owed the plaintiff RM15,773,980.20 and the only tangible sum arguably recoverable by the defendant for un-recouped

advance payment was merely RM8,045,173.71 (the potential LAD claim having to be necessarily ignored for being overly arbitrary, speculative and unquantifiable), it was manifestly unfair and without justification for the defendant to make a demand for payment under either the performance bond or the advance payment guarantee. The balance of convenience favoured the plaintiff to restrain the defendant from receiving payment under the bond or guarantee in preservation of the status quo pending the disposal of the arbitration proceedings. It was otherwise unconscionable (see paras 51–52).

(5) The performance bond and advance payment guarantee in the instant case were both conditional and it was obligatory upon the defendant to assert the plaintiff's default. This it had done in its letters of demand. Since the plaintiff's application was to restrain the defendant from receiving payment under the bond and guarantee, it had to show a strong case of unconscionability on the defendant's part. Mere allegations of contractual breach were insufficient to constitute unconscionability (see paras 34–36, 39 & 41).

[Bahasa Malaysia summary

Berdasarkan perjanjian tiga pihak di antara defendan, MRTC dan PDP, defendan telah dilantik sebagai kontraktor untuk melaksanakan dan menyelesaikan projek mass rapid transit. Melalui subkontrak di antara defendan dan plaintif, plaintif dilantik sebagai subkontraktor PDP untuk melaksanakan sebahagian dari kerja untuk projek tersebut. Untuk memenuhi syarat subkontrak tersebut, plaintif mengambil *on-demand performance bond dan advance payment guarantee* ('bon dan jaminan') untuk defendant. Klausa 25.2(a) dan 26.7 subkontrak melarang defendan daripada menggunakan wang di bawah bon dan jaminan melainkan PDP telah mengeluarkan kepada defendan (dengan salinan pendua kepada plaintif) sijil yang menyatakan bahawa plaintif telah melakukan pelanggaran terhadap subkontrak tersebut. Pertikaian di antara pihak-pihak tersebut akibat dakwaan kelewatan penyiapan kerja, sijil sementara yang tidak dibayar, dan lain-lain, dan ianya tidak dapat dibendung ketika defendan membatalkan subkontrak tersebut dan menuntut pembayaran di bawah bon dan jaminan. Plaintif mempertikaikan kesahihan penamatan tersebut dan merujuk semua pertikaian dan perbalahan di antara pihak-pihak tersebut ke arbitrasi. Di samping itu, plaintif memfailkan saman pemula segera ('SP'), antara lain, agar perintah sementara injunksi dikeluarkan untuk menghalang defendan menerima bayaran di bawah bon dan jaminan dan untuk mengekalkan status quo sehingga proses arbitrasi selesai. Ketika pendengaran OS, plaintif berhujah bahawa pembatalan subkontrak adalah tidak sah dan mala fide dan adalah tidak wajar bagi defendan untuk menuntut pembayaran di bawah bon dan jaminan sebelum pertikaian di antara pihak-pihak tersebut diputuskan di arbitrasi. Sebaliknya, defendan berhujah bahawa pembatalan tersebut adalah

sah kerana, antara lain, kegagalan plaintif untuk mematuhi garis masa penyelesaian boleh menyebabkan defendan bertanggungjawab untuk membayar ganti rugi yang besar telah ditetapkan kepada PDP.

Diputuskan, membenarkan injunksi tersebut:

(1) Klausa 25.2(a) dan 26.7 subkontrak menyatakan bahawa defendan tidak boleh menggunakan pembayaran di bawah performance bond dan advance payment guarantee tanpa PDP mengeluarkan sijil bertulis kepada defendan (dengan salinan yang diberikan kepada plaintif) bahawa plaintif telah gagal melaksanakan tanggungjawabnya di bawah klausa 25.1 dan 26.6 subkontrak tersebut. Tiada bukti mengenai sijil bertulis yang dikeluarkan oleh PDP untuk tujuan ini. Mahkamah Rayuan dalam *Kejuruteraan Bintai Kindenko Sdn Bhd lwn Nam Fatt Construction Sdn Bhd & Anor* (keputusan yang mengikat mahkamah ini) berpendapat bahawa sijil seperti yang disebutkan di atas adalah *condition precedent* terhadap hak untuk menuntut terhadap performance bond tersebut dan ketiadaan sijil tersebut, maka tuntutan itu adalah belum sah/pra matang. Tuntutan defendan terhadap bon dan jaminan juga pra matang dan tidak sah. Defendan harus menunggu keputusan dalam arbitrasi sebelum wang di bawah bon dan jaminan dapat dituntut (lihat perenggan 42–43 dan 53).

(2) Hujah defendan yang menyatakan klausa 25.2 (a) dan 26.7 hanya menghalangnya daripada menggunakan wang yang boleh ditunaikan tetapi bukan pembayaran melalui tunai itu sendiri adalah hujahan tidak benar yang secara jelas tidak adil kerana akan memprejudis plaintif kerana plaintif perlu mengganti rugi pihak bank jika ia dibayar di bawah bon dan jaminan (lihat perenggan 43).

(3) Pihak-pihak tersebut mengakui bahawa defendan berhutang dengan plaintif sebanyak RM15,773,980.20 (terdiri daripada sijil sementara yang belum dibayar dan tuntutan lain yang tidak disahkan) sementara defendan mendakwa ia berhak mendapat ganti rugi sebanyak RM73 juta sebagai ganti rugi yang dilikuidasi dan ditetapkan ('LAD') bahawa ia mungkin perlu membayar PDP untuk jangkaan tidak memenuhi tarikh-tarikh penting di bawah kontrak kerja. Pengiraan LAD tersebut oleh defendan adalah secara arbitrari dan spekulatif dan menganggap bahawa plaintif bertanggungjawab sepenuhnya terhadapnya. Pengiraan jumlah tersebut adalah terlalu diambil mudah dan tidak sesuai. Walaupun defendan telah menunjukkan notis amaran yang diterimanya dari PDP yang mengancam akan mengenakan LAD, ia adalah tidak memadai untuk menjustifikasikan penolakan tersebut. Oleh itu, adalah masuk akal bahawa klausa 25.2 (a) memerlukan sijil PDP sebelum wang di bawah *performance bond* dapat digunapakai untuk mengelakkan tuntutan yang tidak wajar oleh defendan terhadap plaintif seperti

kelewatan menyelesaikan kerja di mana kelewatan mungkin disebabkan atau disumbangkan oleh defendan sendiri (lihat perenggan 44–46).

(4) Oleh kerana defendan berhutang dengan plaintif sebanyak RM15,773,980.20 dan satu-satunya jumlah ketara yang boleh didapatkan semula oleh defendan untuk pembayaran pendahuluan yang belum dikumpulkan hanyalah RM8,045,173.71 (tuntutan LAD yang berpotensi diabaikan kerana terlalu arbitrari, spekulatif dan tidak dapat disahkan), itu jelas tidak adil dan tanpa justifikasi bagi defendan untuk membuat tuntutan pembayaran samada di bawah *performance bond* atau *advance payment guarantee*. Keseimbangan untuk kemudahan memihak kepada plaintif untuk menghalang defendan daripada menerima pembayaran di bawah bon atau jaminan untuk mengekalkan status quo sementara menunggu proses arbitrasi selesai. Jika tidak, perkara itu adalah tidak wajar (lihat perenggan 51–52).

(5) *Performance bond* dan *advance payment guarantee* dalam kes ini adalah bersyarat dan wajib bagi defendan untuk menyatakan pelanggaran oleh plaintif. Ini harus dilakukan dalam surat tuntutannya. Oleh kerana permohonan plaintif adalah untuk menghalang defendan daripada menerima pembayaran di bawah bon dan jaminan, ia harus menunjukkan kes yang kuat untuk membuktikan defendan tidak bertanggungjawab. Tuduhan pelanggaran kontrak semata-mata tidak mencukupi untuk menunjukkan tidak bertanggungjawab (lihat perenggan 34–36, 39 & 41).]

Cases referred to

Bina Mekar Sdn Bhd v Director of Irrigation and Drainage & Ors [2016] MLJU 1513; [2016] 1 LNS 1722, HC (refd)

Chengaljati Sdn Bhd v Turnpike Synergy Sdn Bhd & Ors [2019] MLJU 1114; [2019] 1 LNS 549, HC (refd)

Daya CMT Sdn Bhd v Yuk Tung Construction Sdn Bhd [2016] MLJU 352; [2016] 1 LNS 649, HC (refd)

Esso Petroleum Malaysia Inc v Kago Petroleum Sdn Bhd [1995] 1 MLJ 149; [1995] 1 CLJ 283, FC (refd)

Itramas Technology Sdn Bhd v AmBank (M) Berhad and Anor [2009] MLJU 855; [2009] AMEJ 0094, HC (refd)

Kejuruteraan Bintai Kindenko Sdn Bhd v Nam Fatt Construction Sdn Bhd & Anor [2011] 7 CLJ 442, CA (folld)

Malaysian Resources Corporation Berhad v HSBC Bank Malaysia Bhd & Ors and Another Case [2019] 1 LNS 1158, HC (refd)

Raymond Construction Pte Ltd v Low Yang Tong & Anor [1996] SGHC 136, HC (refd)

Royal Design Studio Pte Ltd v Chang Development Pte Ltd [1990] SLR 1116, HC (refd)

Sumatec Engineering and Construction Sdn Bhd v Malaysian Refining Co Sdn

Bhd [2012] 4 MLJ 1; [2012] 3 CLJ 401, FC (refd)
Target Resources Sdn Bhd v Thp Bina Sdn Bhd [2019] MLJU 266; [2019] 4 MLRA 544, CA (refd)
Teknik Cekap Sdn Bhd v Public Bank Bhd [1995] 3 MLJ 449; [1995] 4 CLJ 697, CA (refd)

Legislation referred to

Arbitration Act 2005 s 11

Yusman bin Mohd Badar (Muhammad Nazmi bin Hanafi with him) (Chambers of Yusman Azlin Anwar) for the plaintiff.
Sanjay Mohan (Gobinath Karuppan with him) (Sanjay Mohan) for the defendant.

Lim Chong Fong J:

INTRODUCTION

[1] This is an application for an injunction to restrain the receipt of monies under a performance bond and advance payment guarantee in preservation of the status quo pending the resolution of disputes pursuant to a construction contract in arbitration proceedings.

[2] The plaintiff is a private limited company involved in the construction business.

[3] Likewise, the defendant is also a private limited company involved in the construction business and a subsidiary of AZRB that is listed in Bursa Malaysia.

SALIENT BACKGROUND FACTS

[4] By a contract made amongst the Mass Rapid Transit Corporation Sdn Bhd ('MRTC'), MMC Gamuda (PDP SSV) Sdn Bhd ('PDP') and the defendant dated 21 June 2016 ('works contract'), the defendant has been appointed as the works contractor to carry out and complete the project described as the Projek Mass Rapid Transit Laluan 2: Sungai Buloh — Serdang — Putrajaya (SSP) ('project').

[5] Consequently by a sub contract made between the defendant and the plaintiff dated 10 March 2017 ('contract'), the plaintiff has been appointed as the nominated sub contractor of the PDP to carry out and complete part of the works of the project described as Package S202: Construction and Completion of Elevated Stations and other Associated Works at Kepong Sentral, Metro

Prima, Kepong Baru and Jinjang ('works').

[6] The provisions in the contract, in respect of performance bond and advance payment guarantee, are as follows respectively:

> 25.0 Performance Bond
>
> 25.1 Condition Precedent
>
> (a) The Nominated Sub-Contractor shall, within twenty one (21) days from the date of this Sub-Contract and as a condition precedent to the commencement of any works under this Sub-Contract, deposit with the Works package Contractor an irrevocable and payable on-demand Performance Bond, in a similar format as provided in Appendix 2 of the Main Contract, equivalent to five (5%) percent of the Sub Contract Sum issued by a first tier bank in Malaysia approved by the Works Package Contractor to secure the due performance of the obligations under this Sub-Contract by the Nominated Sub Contractor. The Nominated Sub-Contractor shall maintain and renew the Performance Bond at its own costs and expenses and shall be deemed to have been included in the Sub-Contract sum. The performance Bond shall be effective from the date of issuance until two (2) months after issuance of the Certificate of Completion of Making Good Defects under the Main Contract.
>
> ...
>
> 25.2 Application of Performance Bond
>
> (a) If the Nominated Sub-contractor fails to carry out this Sub-Contract or commits any breach of his obligations under this Sub-Contract, the Works Package Contractor may utilise and make payments out of deductions from the Performance Bond, provided that the Works Package Contractor shall not be entitled to utilise such Performance Bond unless the PDP shall have issued to the Works Package Contractor (with a duplicate copy to the Nominated Sub-Contractor) a certificate in writing stating in his opinion that the Nominated Sub-Contractor has been in default as aforesaid.
>
> 26.0 Advance Payment
>
> 26.1 The Nominated Sub-Contractor shall provide an on-demand bank guarantee in a similar format as provided in Appendix 8 of the Main Contract and issued by a first tier bank in Malaysia acceptable to the Works Package Contractor (hereinafter referred to as the 'Advance Payment Guarantee') for the sum equal to five (5%) per cent of the Sub-Contract Sum less Provisional Sums and contingency sums (if any) (hereinafter referred as the 'Advance Payment'). The Nominated Sub-Contractor shall maintain and renew if necessary the said Advance Payment so that it shall remain in full force and effect until the expiry of thirty (30) days after the Date for practical completion or thirty (30) days from the date upon which the full amount of the Advance Payment shall have been repaid, whichever is later. The cost of obtaining and maintaining the Advance Payment Guarantee shall be at the expense of the Nominated Sub-Contractor and shall be deemed to have been included in the Sub-Contract Sum.

...

26.5 The Advance Payment shall be repaid through percentage deductions in each Interim Certificate until an amount equal to the Advance Payment has been recouped.

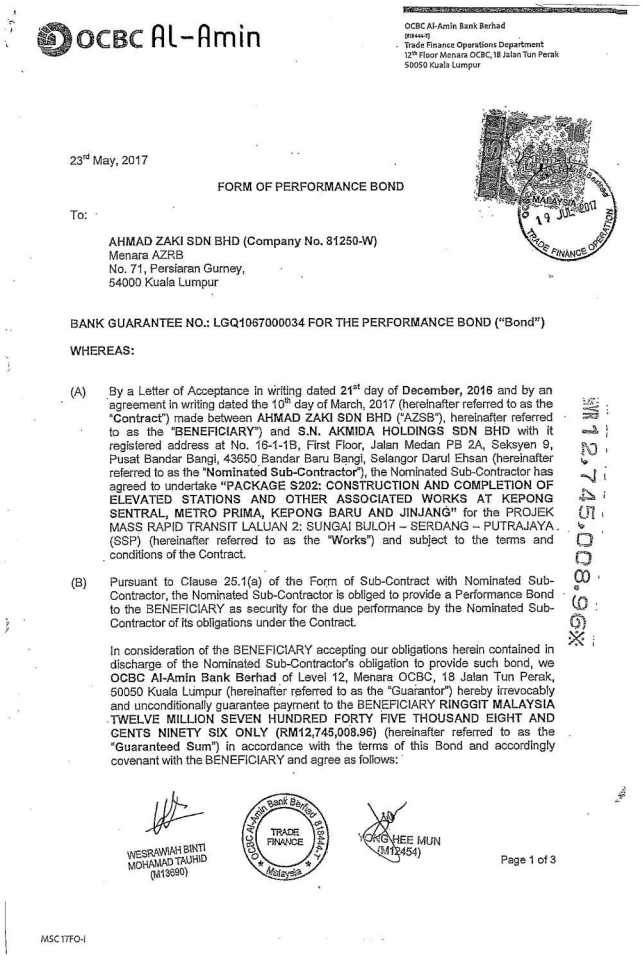
26.6 The recoupment of the Advance Payment shall commence when the cumulative value of the Sub-Contract Works executed and certified (including the amount certified for materials on site) in the Interim Certificate issued under clause 28 of the Main Contract reaches twenty five percent (25%) of the Sub-Contract Sum less Provisional sum, by way of fixed percentage deduction from the total certified value of the Sub-Contract Works executed (including the amount certified for materials on site) during the period covered by an Interim certificate, in all subsequent Interim Certificate on the basis that the Advance Payment made shall be fully recovered in the Interim Certificate in which the cumulative total certified value of the Sub-Contract Works executed (including the amount certified for materials on site) reaches seventy five percent (75%) of the Sub-Contract Sum less Provisional sums or three (3) months prior to the Date for Practical Completion (whichever is earlier) ...

For avoidance of doubt, if the Advance Payment has not been repaid in full three (3) months prior to the Date for Practical Completion, the whole of the balance then outstanding shall immediately become due and payable by the Nominated Sub-Contractor under this Sub-Contract. The Works Package Contractor and the PDP shall be entitled at any time to review the recoupment amount and if it appears that the full repayment shall not be achieved by the time three (3) months prior to the Date for Practical Completion, the Works Package Contractor with the prior concurrence of the PDP, may amend the recoupment formula to ensure that full repayment will be achieved by such time.

26.7 The Works Package Contractor shall not be entitled to utilise such Advance Payment Guarantee unless the PDP shall have issued to the Works Package Contractor (with a duplicate copy to the Nominated Sub-Contractor) a certificate in writing in his opinion that the Nominated Sub Contractor has been in default as aforesaid.

[7] Accordingly, the plaintiff furnished to the defendant the following performance bond ('performance bond') and advance payment guarantee ('advance payment guarantee'):

A



OCBC Al-Amin

OCBC Al-Amin Bank Berhad
[918444-T]
Trade Finance Operations Department
12th Floor Menara OCBC, 18 Jalan Tun Perak
50050 Kuala Lumpur

B

23rd May, 2017

FORM OF PERFORMANCE BOND

To:

C

AHMAD ZAKI SDN BHD (Company No. 81250-W)
Menara AZRB
No. 71, Persiaran Gurney,
54000 Kuala Lumpur

BANK GUARANTEE NO.: LGQ1067000034 FOR THE PERFORMANCE BOND ("Bond")

WHEREAS:

D

(A) By a Letter of Acceptance in writing dated **21st** day of **December, 2016** and by an agreement in writing dated the 10th day of March, 2017 (hereinafter referred to as the "**Contract**") made between **AHMAD ZAKI SDN BHD** ("AZSB"), hereinafter referred to as the "**BENEFICIARY**") and **S.N. AKMIDA HOLDINGS SDN BHD** with it registered address at No. 16-1-1B, First Floor, Jalan Medan PB 2A, Seksyen 9, Pusat Bandar Bangi, 43650 Bandar Baru Bangi, Selangor Darul Ehsan (hereinafter referred to as the "**Nominated Sub-Contractor**"), the Nominated Sub-Contractor has agreed to undertake "**PACKAGE S202: CONSTRUCTION AND COMPLETION OF ELEVATED STATIONS AND OTHER ASSOCIATED WORKS AT KEPONG SENTRAL, METRO PRIMA, KEPONG BARU AND JINJANG**" for the PROJEK MASS RAPID TRANSIT LALUAN 2: SUNGAI BULOH – SERDANG – PUTRAJAYA (SSP) (hereinafter referred to as the "**Works**") and subject to the terms and conditions of the Contract.

E

(B) Pursuant to Clause 25.1(a) of the Form of Sub-Contract with Nominated Sub-Contractor, the Nominated Sub-Contractor is obliged to provide a Performance Bond to the BENEFICIARY as security for the due performance by the Nominated Sub-Contractor of its obligations under the Contract.

In consideration of the BENEFICIARY accepting our obligations herein contained in discharge of the Nominated Sub-Contractor's obligation to provide such bond, we **OCBC Al-Amin Bank Berhad** of Level 12, Menara OCBC, 18 Jalan Tun Perak, 50050 Kuala Lumpur (hereinafter referred to as the "Guarantor") hereby irrevocably and unconditionally guarantee payment to the BENEFICIARY **RINGGIT MALAYSIA TWELVE MILLION SEVEN HUNDRED FORTY FIVE THOUSAND EIGHT AND CENTS NINETY SIX ONLY (RM12,745,008.96)** (hereinafter referred to as the "**Guaranteed Sum**") in accordance with the terms of this Bond and accordingly covenant with the BENEFICIARY and agree as follows:

F

WESRAWIAH BINTI MOHAMAD TAUHID (M13690)

OCBC Al-Amin Bank Berhad 918444-T TRADE FINANCE Malaysia

YONG HEE MUN (M12454)

Page 1 of 3

G

MSC 17FO-I

RM12,745,008.96*

H

I

A

OCBC Al-Amin

OCBC Al-Amin Bank Berhad
(948448)
Trade Finance Operations Department
12th Floor Menara OCBC, 18 Jalan Tun Perak
50050 Kuala Lumpur

B

BANK GUARANTEE NO.: LGQ1067000034

1. Upon receipt of a written demand made by the BENEFICIARY upon the Guarantor from time to time or at any time that the **Nominated Sub-Contractor** has failed to perform its obligations under the Contract (including failure to maintain and renew this Bond in accordance with the Contract) and without being entitled or obliged to make any enquiry to either of the BENEFICIARY or of the **Nominated Sub-Contractor**, and without the need for the BENEFICIARY to take legal actions against or to obtain the consent of the **Nominated Sub-Contractor**, and notwithstanding any objection by the Nominated Sub-Contractor and without any further proof or conditions and without any right of set-off or counterclaim, the Guarantor shall forthwith pay the BENEFICIARY the amount specified in such demand notwithstanding any contestation or protest by the **Nominated Sub-Contractor** or Guarantor or by any third party. Provided always that the total of all demands so made shall not exceed in aggregate the Guaranteed Sum and the total amount recoverable against the Guarantor under this Bond shall not exceed the Guaranteed Sum, and such demand is valid for one lump sum claim only. Such payment or payments shall forthwith be made by transfer to an account at such bank in such place as the BENEFICIARY making the demand shall direct.

C

2. The BENEFICIARY reserves the right to make any partial demands if it shall so desire and the total of all such partial demands shall not exceed in aggregate the Guarantee Sum and the liability of the Guarantor to pay the BENEFICIARY the aforesaid amount shall correspondingly be reduced proportionate to any payment of partial demands having been made by the Guarantor.

D

3. The Guarantor's obligation to make payment under this Bond shall be a primary, independent and absolute obligation and the Guarantor shall not be entitled to delay or withhold payment for any reason. The Guarantor's obligations hereunder shall not be affected by any act, omission, matter or thing which but for this provision might operate to release or otherwise exonerate the Guarantor from his obligations hereunder in whole or in part, including without limitation and whether or not known to the Guarantor or the BENEFICIARY:

E

(a) any time or waiver granted to the **Nominated Sub-Contractor** or any other person; or

(b) the taking, variation, compromise, renewal or release of or refusal or neglect to perfect or enforce any rights, remedies or securities against the **Nominated Sub-Contractor** or any other person; or

(c) any legal limitation, disability or incapacity relating the **Nominated Sub-Contractor** or any other person; or

F

(d) any dispute between the BENEFICIARY and the **Nominated Sub-Contractor** or any allegation that the **Nominated Sub-Contractor** has claims against the BENEFICIARY or any objection or representation made to the Guarantor by the **Nominated Sub-Contractor;** or

WESRAWIAH BINTI MOHAMAD TAUHID (M13890)

OCBC Al-Amin Bank Berhad (948448-K) TRADE FINANCE Malaysia

YONG KEE MUN (H12454)

Page 2 of 3

G

MSC ITFO-I

2

H

I

A

OCBC Al-Amin

OCBC Al-Amin Bank Berhad
(9844-T)
Trade Finance Operations Department
12th Floor Menara OCBC, 18 Jalan Tun Perak
50050 Kuala Lumpur

B

BANK GUARANTEE NO.: LGQ1067000034

(e) any variation of or amendment to the Contract or the works to be performed thereunder or any other document or security so that references to the Contract in this Bond shall include each such variation and amendment; or

C

(f) any unenforceability, invalidity or frustration of any obligations of the **Nominated Sub-Contractor** or any other person under the Contract or either of them or any other document or security.

4. Any payment made hereunder shall be made free and clear of, and without deduction for or on account of, any present or future taxes, duties, charges, fees, deductions or withholdings of any nature whatsoever and by whomsoever imposed.

5. The benefit of this Bond and all rights and powers hereunder may be assigned by the BENEFICIARY subject to consent by the Guarantor which consent shall not be unreasonably withheld.

D

6. This Bond shall be governed by and construed in accordance with the laws of Malaysia and the Guarantor hereby agrees to submit to the exclusive jurisdiction of the courts of Malaysia over any claim arising out of this Bond.

7. Capitalized expressions used in this Bond, which are not otherwise defined herein, shall have the meanings attributed to them as provided in the Contract.

8. This Bond shall remain valid, in full force and effect from **21st December, 2016** and will expire on **28th October, 2023 ("Validity Period")** unless otherwise extended from time to time by the Guarantor following a request by the Nominated Sub-Contractor in accordance with the terms of the Contract.

E

9. If at any time any provision hereof is or becomes illegal, invalid or unenforceable in any respect, the remaining provisions hereof shall in no way be affected or impaired thereby.

IN WITNESS WHEREOF this Bond has been executed on the 23rd day of May, 2017.

F

Signed by)
for and on behalf of)
OCBC Al-Amin Bank Berhad)
in the presence of)

WESRAWIAH BINTI MOHAMAD TAUHID (M13690)

YONG HEE MUN (M12454)

CHONG SIEW LING (M12094)

OCBC Al-Amin Bank Berhad (9844-T) TRADE FINANCE Malaysia

Page 3 of 3

G

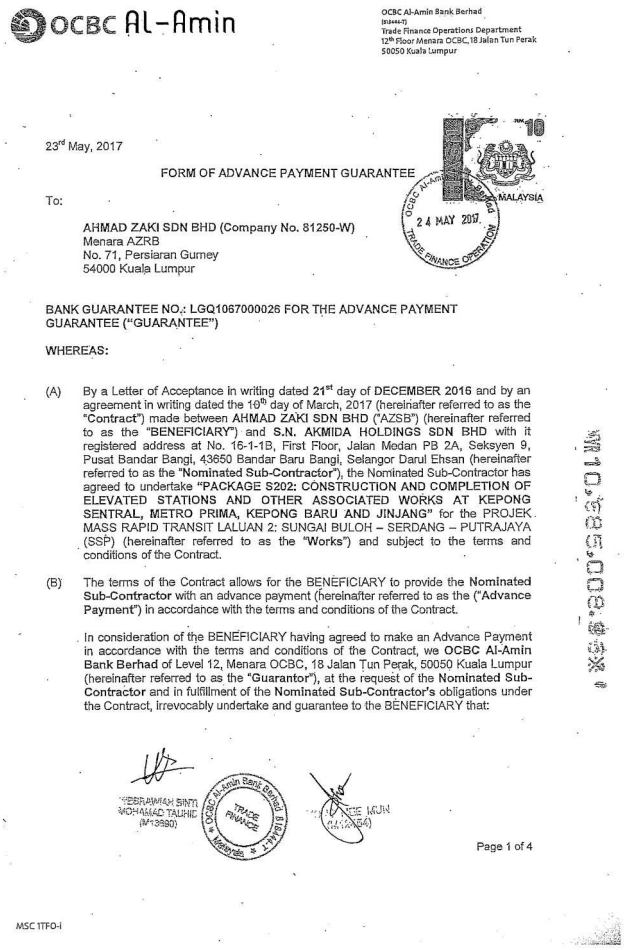
MSC ITFO-i

3

H

I

A



OCBC Al-Amin

OCBC Al-Amin Bank Berhad
(91444-T)
Trade Finance Operations Department
12th Floor Menara OCBC, 18 Jalan Tun Perak
50050 Kuala Lumpur

B

23rd May, 2017

FORM OF ADVANCE PAYMENT GUARANTEE

MALAYSIA

24 MAY 2017

TRADE FINANCE OPERATION

To:

AHMAD ZAKI SDN BHD (Company No. 81250-W)
Menara AZRB
No. 71, Persiaran Gurney
54000 Kuala Lumpur

C

BANK GUARANTEE NO.: LGQ1067000026 FOR THE ADVANCE PAYMENT GUARANTEE ("GUARANTEE")

WHEREAS:

D

(A) By a Letter of Acceptance in writing dated **21st** day of **DECEMBER 2016** and by an agreement in writing dated the 16th day of March, 2017 (hereinafter referred to as the "**Contract**") made between **AHMAD ZAKI SDN BHD** ("AZSB") (hereinafter referred to as the "**BENEFICIARY**") and **S.N. AKMIDA HOLDINGS SDN BHD** with it registered address at No. 16-1-1B, First Floor, Jalan Medan PB 2A, Seksyen 9, Pusat Bandar Bangi, 43650 Bandar Baru Bangi, Selangor Darul Ehsan (hereinafter referred to as the "**Nominated Sub-Contractor**"), the Nominated Sub-Contractor has agreed to undertake "**PACKAGE S202: CONSTRUCTION AND COMPLETION OF ELEVATED STATIONS AND OTHER ASSOCIATED WORKS AT KEPONG SENTRAL, METRO PRIMA, KEPONG BARU AND JINJANG**" for the PROJEK MASS RAPID TRANSIT LALUAN 2: SUNGAI BULOH – SERDANG – PUTRAJAYA (SSP) (hereinafter referred to as the "**Works**") and subject to the terms and conditions of the Contract.

E

(B) The terms of the Contract allows for the BENEFICIARY to provide the **Nominated Sub-Contractor** with an advance payment (hereinafter referred to as the ("**Advance Payment**") in accordance with the terms and conditions of the Contract.

In consideration of the BENEFICIARY having agreed to make an Advance Payment in accordance with the terms and conditions of the Contract, we **OCBC Al-Amin Bank Berhad** of Level 12, Menara OCBC, 18 Jalan Tun Perak, 50050 Kuala Lumpur (hereinafter referred to as the "**Guarantor**"), at the request of the **Nominated Sub-Contractor** and in fulfillment of the **Nominated Sub-Contractor's** obligations under the Contract, irrevocably undertake and guarantee to the BENEFICIARY that:

F

PERAMMAH SINTI MOHAMAD TAUHID (M13980)

OCBC Al-Amin Bank Berhad (91444-T) TRADE FINANCE Malaysia

Page 1 of 4

G

MSC 1TFO-I

4

H

I

A

OCBC Al-Amin

OCBC Al-Amin Bank Berhad
(295440-T)
Trade Finance Operations Department
12th Floor Menara OCBC, 18 Jalan Tun Perak
50050 Kuala Lumpur

B

BANK GUARANTEE NO.: LGQ1067000026

C

1. We shall pay to the BENEFICIARY, the maximum aggregate sum of not exceeding **RINGGIT MALAYSIA TEN MILLION SIX HUNDRED EIGHTY FIVE THOUSAND EIGHT AND CENTS NINETY SIX ONLY (RM10,685,008.96)** being the Advance Payment mentioned above representing five per cent (5%) of the Contract Sum less Provisional Sum, P. C. Sum and contingency sums (if any) so stated in the Contract (hereinafter referred to as the "**Guaranteed Amount**") or such part thereof as shall not have already been recovered by the BENEFICIARY and such sum shall be paid forthwith on the written demand made by the BENEFICIARY notwithstanding any contestation or protest by the **Nominated Sub-Contractor** or by ourselves or any other third party. Such payment or payments shall be forthwith be made by transfer to an account at such bank in such place as the BENEFICIARY making the demand shall direct.

D

2. Any concession or indulgence given by the BENEFICIARY to the **Nominated Sub-Contractor** or any agreement between the BENEFICIARY and the **Nominated Sub-Contractor** or any alteration in the obligation undertaken by the **Nominated Sub-Contractor** or any forbearance given by the BENEFICIARY to the **Nominated Sub-Contractor** whether as to payment, time, performance or otherwise shall not discharge the Guarantor from this Guarantee.

3. Subject to Clause 1, the Guarantor's responsibility for paying the Guaranteed Amount shall be automatically reduced by the amount or amounts of any payment made by the Guarantor to the BENEFICIARY in respect of this Guarantee.

4. Any payment made hereunder this Guarantee shall be made free and clear of, and without any deduction for or on account of any present or future taxes, charges, set off, counterclaims, deductions, or withholdings of any nature whatsoever.

E

5. The obligations of the Guarantor hereunder are absolute and unconditional irrespective of the legality, validity, cancellation or enforceability of the Contract or any other document or instrument contemplated in the Contract. The Guarantor agrees that it shall not be released in any way from any liability under this guarantee, and the validity of this Guarantee shall not be affected, by:

   (a) any amendment to the terms of the Contract or of any document contemplated in the Contract; or

F

   (b) any change in services to be performed under the Contract; or

   (c) any change in the condition, nature or status of the Guarantor; or

   (d) any forbearance whether as to payment, time, performance or otherwise; or

   (e) any legal limitation, disability or incapacity relating to the **Nominated Sub-Contractor** or any other person; or

WESRAWAH BINTI MOHAMAD TAUHID

OCBC Al-Amin Bank Berhad TRADE FINANCE Malaysia

Page 2 of 4

G

MSC ITFO-I

5

H

I

OCBC Al-Amin

OCBC Al-Amin Bank Berhad
(295447)
Trade Finance Operations Department
12th Floor Menara OCBC,18 Jalan Tun Perak
50050 Kuala Lumpur

BANK GUARANTEE NO.: LGQ1067000026

(f) any dispute between the BENEFICIARY and the **Nominated Sub-Contractor** or any allegation that the **Nominated Sub-Contractor** has claims against the BENEFICIARY or any objection or representation made by the **Nominated Sub-Contractor**; or

(g) any other fact, circumstance, provision of statue or rule of law which might, make the Guarantor's liability to be secondary rather than primary, entitle the Guarantor to be released in whole or in part from its obligations in this Guarantee,

and the Guarantor hereby waives notice sent to the Guarantor of any amendments or additions to paragraphs (a) and (b) above.

6. The benefit of this Guarantee and all rights and powers hereunder may be assigned by the BENEFICIARY subject to prior written consent by the Guarantor which consent shall not be unreasonably withheld.

7. This Bond shall be governed by and construed in accordance with the laws of Malaysia and the Guarantor hereby agrees to submit to the exclusive jurisdiction of the courts of Malaysia over any claim arising out of this Bond.

8. Capitalized expressions used in this Bond, which are not otherwise defined herein, shall have the meanings attributed to them as provided in the Contract.

9. This Guarantee shall remain valid, in full force and effect from **21st December, 2016** and will expire on **30th October, 2020** ("**Validity Period**") unless otherwise extended from time to time by the Guarantor at Guarantor's discretion following a written request by the **Nominated Sub-Contractor** in accordance with the terms of the Contract.

10. If at any time any provision hereof is or becomes illegal, invalid or unenforceable in any respect, the remaining provisions hereof shall in no way be affected or impaired thereby.

ABDULAMIAH BINTI MOHAMAD TAUHIT
(I.C. NO.)

OCBC Al-Amin Bank Berhad (295447-U) TRADE FINANCE Malaysia

Page 3 of 4

MSC ITFO-I

OCBC Al-Amin

OCBC Al-Amin Bank Berhad
[199401-T]
Trade Finance Operations Department
12th Floor Menara OCBC,18 Jalan Tun Perak
50050 Kuala Lumpur

BANK GUARANTEE NO.: LGQ1067000026

11. Demands, if any, must be made in writing and received by the Guarantor at OCBC Al-Amin Bank Berhad, Central Services, Level 2, Menara OCBC, 18, Jalan Tun Perak, 50050 Kuala Lumpur within the **Validity Period** of this Guarantee, failing which all our liabilities and obligations on this Guarantee shall be deemed to be completely absolved thereafter, notwithstanding that the original of this Guarantee is not returned to us for cancellation.

IN WITNESS WHEREOF this Bond has been executed on the 23rd day of May, 2017

Signed by)
for and on behalf of)
OCBC Al-Amin Bank Berhad)
in the presence of)

CHIU WING YU
(M14761)

Page 4 of 4

MSC TFO-I

7

[8] Since late 2018, there were disputes and differences that arose between the parties pursuant to the contract. The defendant claimed that the plaintiff did not progress with the carrying out of the works with reasonable diligence, which would expose the defendant to the imposition of liquidated and ascertained damages by the PDP under the works contract.

[9] However the plaintiff retorted that it was progressing with reasonable

diligence pursuant to the contract notwithstanding the constraints encountered as late access handover of site given to the plaintiff because of the defendant's failure to comply with the scheduled key dates for NSC access.

[10] The PDP on 14 February 2019 wrote to the defendant warning the defendant about significant delays to the MRT stations completion that would result in forecasted defendant's combined actual and projected station liquidated and ascertained damages exposure of RM157.40m as at 31 January 2019. As a result, the PDP instructed the defendant to negotiate and enter into a supplementary agreement with the plaintiff to take work acceleration measures that is estimated to reduce the defendant's exposure to liquidated and ascertained damages by RM13.93m.

[11] As a result, the parties on 20 May 2019 entered into supplemental agreement No 1 ('supplementary agreement') to amend, revise and modify the contract to provide for a formal commercial agreement to implement acceleration measures. By the supplementary agreement, the plaintiff would be entitled to be paid additional acceleration measures of RM700,000 by the PDP and a maximum limit of RM11,565,520 by the defendant.

[12] However subsequent thereto, the defendant claimed that the plaintiff still did not progress with the carrying out of the works with reasonable diligence pursuant to the contract and supplementary agreement. Consequently, the plaintiff did not meet the stipulated key access dates and the revised key access dates. In addition, the defendant claimed that the plaintiff did not pay its sub contractors for their work done.

[13] The plaintiff disputed the defendant's claim and further retorted that the defendant failed to pay the plaintiff in accordance with the contract and supplementary agreement.

[14] In consequence, the defendant on 22 October 2019 issued to the plaintiff a notice of default specifying that the plaintiff was in default of its obligations pursuant to cll 31.0(c), 31.0(e) and 31.0(g) of the contract and required the plaintiff to remedy the aforesaid defaults within 14 days from the receipt of the notice.

[15] The plaintiff on 6 November 2019 responded to the defendant that the plaintiff has not been paid on its interim payment certificates for July 2019 and August 2019 pursuant to the contract as well as not been paid anything whatsoever pursuant to the supplementary agreement. Moreover, the plaintiff also on 11 November 2019 wrote to the defendant to explain the necessary remedies it had implemented as well as its justification of its progress of work as achieved.

[16] The defendant nevertheless on 13 November 2019 wrote to the plaintiff to terminate the contract.

[17] Additionally, the defendant on 13 November 2019 made its demand in writing against the performance bond on OCBC Al-Amin Bank Bhd for the sum of RM12,745,008.96. The defendant also on 13 November 2019 made its demand in writing against the advance payment guarantee on OCBC Al-Amin Bank Bhd for the sum of RM10,685,008.96 but which was amended to RM8,045,173.71 on 14 November 2019.

[18] The plaintiff in consequence, on 18 November 2019, wrote to the defendant to dispute the termination of the contract and referred all the disputes and differences that have arisen pursuant to the contract to arbitration.

[19] In addition, the plaintiff on 19 November 2019 filed this originating summons ('application') pursuant to ss 8, 9, 11(f) and (h) of the Arbitration Act 2005 praying as follows:

> 1. Suatu Perintah bahawa Plaintif dibenarkan untuk suatu pemeliharaan, jagaan interim yang menjadi hal pertikaian antara Plaintif dan Defendan berikutan pembatalan kontrak pembinaan yang diberikan oleh Defendan kepada Plaintif yang bertajuk 'PROJEK MASS RAPID TRANSIT LALUAN 2: SUNGAI BULOH — SERDANG — PUTRAJAYA (SSP) PACKAGE V202: CONSTRUCTION AND COMPLETION OF VIADUCT GUIDEWAY AND OTHER ASSOCIATED WORKS FROM PERSIARAN DAGANG TO JINJANG PACKAGE S202: CONSTRUCTION AND COMPLETION OF ELEVATED STATIONS AND OTHER ASSOCIATED WORKS AT KEPONG SENTRAL, METRO PRIMA, KEPONG BARU AND JINJANG (S202)' yang berjumlah RM254,900,179.17 melalui perjanjian dokumen kontrak yang dipanggil Form of Sub-Contract For Nominated Sub-Contractor bertarikh 10.3.2017 yang mana telah ditamatkan oleh Defendan melalui Notis Penamatan bertarikh 13.11.2019 sehingga pertikaian atau pertikaian-pertikaian tersebut diputuskan menurut bidangkuasanya sehingga pelupusan prosiding timbang tara, iaitu:
>
> (a) 'Performance Bond dengan Bank Guarantee No. LGQ1067000034 bertarikh 23 Mei 2017 yang dikeluarkan oleh OCBC Al-Amin Bank Berhad berjumlah RM12,745,008.96 atau apa-apa jumlah daripadanya yang asalnya Defendan sebagai benefisiari yang telah dipohon oleh Plaintif;
>
> (b) Jumlah bayaran Pendahuluan ('Advance Payment Guarantee') dengan bank Guarantee No. LGQ1067000026 bertarikh 23 Mei 2017 yang dikeluarkan oleh OCBC Al-Amin bank Berhad berjumlah RM10,685,008.96 atau apa-apa jumlah daripadanya yang asalnya Defendan sebagai benefisiari yang telah dipohon oleh Plaintif.
>
> 2. Suatu injunksi atau langkah-langkah interim yang berpatutan dengan

menghalang Defendan samada dengan sendirinya atau samada oleh pegawainya, pekerjanya, wakil syarikat, agennya dan oleh mana-mana pihak yang ada kaitan dengannya hendaklah dilarang secara injunksi interim daripada menunaikan Jaminan Perlaksanaan ('Performance Bond') dengan Bank Guarantee No. LGQ1067000034 bertarikh 23 Mei 2017 yang dikeluarkan oleh OCBC Al-Amin Bank Berhad berjumlah RM12,745,008.96 atau apa-apa jumlah daripadanya yang asalnya Defendan sebagai benefisiari yang telah dipohon oleh Plaintif dan pada bila-bila masa bagi suatu pemeliharaan harta interim dengan serta-merta ('forthwith') selepas penyampaian Perintah ini sehingga pelupusan prosiding timbang tara.

3. Suatu injunksi atau langkah-langkah interim yang berpatutan dengan menghalang Defendan samada dengan sendirinya atau samada oleh pegawainya, pekerjanya, wakil syarikat, agennya dan oleh mana-mana pihak yang ada kaitan dengannya hendaklah dilarang secara injunksi interim daripada menunaikan Jaminan Bayaran Pendahaluan ('Advance Payment Guarantee') dengan Bank Guarantee No. LGQ1067000026 bertarikh 23 Mei 2017 yang dikeluarkan oleh OCBC Al-Amin Bank Berhad berjumlah RM10,685,008.96 atau apa-apa jumlah daripadanya yang asalnya Defendan sebagai benefisiari yang telah dipohon oleh Plaintif dan pada bila-bila masa bagi suatu pemeliharaan harta interim dengan serta-merta ('forthwith') selepas penyampaian Perintah ini sehingga pelupusan prosiding timbang tara.

4. Suatu injunksi atau langkah-langkah interim yang berpatutan dengan menghalang Defendan samada dengan sendirinya atau pegawainya, atau rakan kongsinya, peguamnya, ejennya, wakilnya, atau kakitangannya hendaklah dilarang secara injunksi interim daripada terus berurusan dengan OCBC Al-Amin Bank Berhad bagi sebarang tujuan berkaitan menunaikan Performance Bond dan Advance Payment Guarantee secara kumulatif berjumlah RM23,430,017.92 atau mana-mana daripadanya bagi apa-apa jumlah daripadanya bagi mengekalkan status quo tindakan Plaintif terhadap Defendan sebelum pertikaian menurut bidangkuasanya sehingga pelupusan prosiding timbang tara.

5. Gantirugi am yang ditaksirkan Mahkamah Yang Mulia ini.

6. Gantirugi khas yang ditaksirkan Mahkamah Yang Mulia ini.

7. Kos bagi dan bersampingan dibayar oleh Defendan.

8. Lain-lain relif atau apa-apa Perintah yang difikirkan adil dan suai manfaat oleh Mahkamah Yang Mulia ini.

[20] The affidavits that were filed for purposes of this application are as follows:

(a) plaintiff's affidavit in support affirmed by Shukry bin Md Saad dated 18 November 2019;

(b) defendant's affidavit in reply affirmed by Long Hamdan bin Long Mat dated 2 December 2019; and

(c) plaintiff's affidavit in reply affirmed by Shukry bin Md Saad dated 16 December 2019.

[21] The application came before me for hearing on 24 December 2019. After having read the cause papers and skeletal submissions filed by the parties, I heard oral arguments of counsel. I thereafter adjourned my decision to deliberate on the arguments advanced by counsel.

[22] Now having so deliberated, I furnish my decision below together with the supporting grounds.

CONTENTIONS AND FINDINGS

[23] The plaintiff principally contended that the defendant unlawfully in bad faith terminated the contract and it is, in the circumstances, unconscionable for the defendant to have demanded against the performance bond and advance payment guarantee. The plaintiff stressed that the defendant failed to pay the plaintiff as provided in the contract and supplementary agreement which resulted in the plaintiff's inability to expedite the carrying out of the works under the contract.

[24] As a result, the plaintiff has referred the disputed termination of the contract to arbitration and is, in the meantime, entitled to an injunction to preserve the status quo in respect of the payment under performance bond and advance payment guarantee to the defendant as demanded.

[25] However, the defendant counter-contended that it had lawfully terminated the contract by virtue of the plaintiff's failure to carry out the works under the contract with reasonable diligence; thus jeopardising and exposing the defendant to massive liquidated and ascertained damages by the PDP. In addition, the termination of the contract was sanctioned by the PDP. Consequently, the defendant is entitled to demand upon and encash the performance bond and advance payment guarantee which are payable forthwith on-demand.

[26] Generally, the law on performance bonds is well encapsulated in the following judgment of Shaik Daud bin Mohd Ismail JCA in the Court of Appeal case of *Teknik Cekap Sdn Bhd v Public Bank Bhd* [1995] 3 MLJ 449; [1995] 4 CLJ 697 with emphasis added by me:

> *Having considered the submissions it is relevant to find out what therefore is a performance bond. As I see it there is nothing special or unique in a performance bond. It is in fact a written contract of guarantee by a bank, other financial institutions or in some cases an insurance company, whereby they guarantee the due performance of a contract and in the event of a breach or non-performance of the contract, they guarantee*

to pay, on a written demand being made, the sum stipulated in the guarantee. Therefore a performance bond is nothing more than a written guarantee, and in order to interpret the obligations of the bank, one need only look at the written bond itself to determine what are the terms and conditions agreed upon between the parties. A great deal, therefore, depends on the wordings of the bond itself.

...

It 'involves a straightforward exercise of constructions, or interpretation, of the bond to discover the intention of the parties.' This is the unanimous view expressed in *IE Contractors Ltd v Lloyds Bank plc and Rafidian Bank* [1990] 51 BLR 1.

Much of the confusion and problems in interpreting performance bonds arose with the celebrated decision of the English Court of Appeal in *Edward Owen Engineering Ltd v Barclays Bank International Ltd and Utama Bank* [1977] 6 BLR 1. In that case Lord Denning MR having pointed out that a performance bond was similar to a letter of credit added that performance bonds are virtually promissory notes payable on demand. Since then it has been seen that performance bonds are, however, not on the same footing as letters of credit; they do not form part of the financial transactions supporting the performance of a contract. They are in fact collateral and subsidiary to a contract. *IE Contractors Ltd v Lloyds Bank and Rafidian Bank* the court made a distinction between letters of credit and performance bonds and made it clear that the question of what was required to comply with a particular performance bond was one of construction of that bond. *There is no doubt that some performance bonds must be paid merely on a demand being made, and whether this is so must depend on the wordings of the bond itself.* In *Kiramas Sdn Bhd v Federal Land Development Authority* [1991] 2 MLJ 198 the guarantee provides that the guarantor shall 'irrevocably and absolutely guarantee payment on demand without having to assign any reason whatsoever for such demand.' *In the light of these clear and unambiguous wordings it can be said that this is an unconditional and a pure 'on demand' bond.* What is required to trigger payment in such bonds is the demand simpliciter. In *Esso Petroleum Malaysia Inc. v Kago Petroleum Sdn. Bhd* [1995] 1 AMR 189 the then Supreme Court on examination of the performance bond in that case held that it was a pure on demand guarantee and therefore a mere demand would trigger the guarantees without asserting any reasons thereto. In that case the guarantor 'unconditionally and irrevocably guarantee payment ...

...

The line of authorities seem to indicate that the Courts adopted a strict interpretation of performance bond and that in making demands on them the beneficiary must adhere strictly to their terms. This line of interpretation seems to be more sensible as it requires the beneficiary of the performance bond to state in plain terms that they must, if honest, be prepared to assert, and may place him in peril of a charge of obtaining money by deception if later it turns out to be untrue to his knowledge. Furthermore banks, other financial institutions and perhaps insurance companies would be left to assume that a breach of the contract had taken place. This is more so as they cannot challenge the demand. The banks are in fact not required to be told the nature of the breach or who is to be blamed for the breach. That is not the concern of the bank but it must be asserted that the demand is made as a result of a breach by the sub-contractor.

[27] As to the law on injunctions restraining pay-out against performance bonds, Peh Swee Chin SCJ held as follows in the Federal Court case of *Esso Petroleum Malaysia Inc v Kago Petroleum Sdn Bhd* [1995] 1 MLJ 149; [1995] 1 CLJ 283 with emphasis added by me:

> On the type of such pure on-demand performance bonds its issuer should unquestionably pay on demand except in the case of fraud. Any argument of immediate disadvantage to the party who caused such a document to be in use is of no avail to the party who must face the risks of such unquestioned payment except where there is fraud; there was even no allegation of it, let alone any evidence on it.
>
> Learned counsel for the appellant was at some pains to impress on us that the injunction should not have been granted by the lower court in the first place to restrain the buyer from receiving any sum of money under the two performance bonds in question on the ground that *American Cynamid v Ethicon* [1975] AC 396 had no application in a situation of restraint of payment on a bank guarantee.
>
> While agreeing that the interlocutory ex-parte injunction granted herein in the circumstances of this instant appeal should have been discharged by the learned judge, to say that *American Cynamid* could not be considered in exercising any discretion in granting or withholding such an interlocutory injunction in regard to a bank guarantee was wide off the mark. *Except in the case of a few exceptions which did not apply to the instant appeal, American Cynamid would apply to all interlocutory injunctions. An interlocutory injunction could arise out of such alleged invasion of the right of the seller ie. the plaintiff, by the buyer ie, the defendant under the said contracts between the seller and the buyer. Therefore, despite the resulting effect that it would restrain Bank Bumiputra, it could not prevent the seller from applying for an interlocutory injunction.*
>
> In considering the seller's application for an interlocutory injunction and applying *American Cynamid*; without the need to ascertain the respective strength of the respective cases of the respective parties herein at this stage, the seller had alleged a breach of contracts ie. the buyer's presumably repeated refusal to accept the said goods; and the legal failure by the buyer to notify its intention to the seller of claiming damages when buyer had accepted the said goods out of time while time had been earlier agreed to be of the essence. The seller had given in turn the answers to all these. These were serious questions for trial and even though they were not that serious, but nonetheless they could not be described as frivolous or vexatious.
>
> *Next, the question of balance of convenience would fall for consideration. The first of the principles applicable in regard thereto would be* that essentially the remedy of the seller as plaintiff would be in damages and the buyer would undoubtedly be able to pay; the buyers being owned, either directly or ultimately, by one of the world's largest multinational companies. Having sought the release of deductions by the buyer earlier, and offering in exchange bank guarantee ie performance bonds, one could infer therefrom some liquidity problem of the seller, and in the absence of anything else, there was some doubt as to whether the seller could financially pay the damages given under a usual undertaking to pay damages on an injunction being guaranteed. *While considering other factors in conjunction with what has been stated above, there was a special one among them, ie. performance bonds of the present sort were involved here. A performance bond, like a pure on-demand guarantee in the instant appeal, has*

always occupied an important place in the national or international world of commerce. It will be remembered that Lord Diplock in *American Cynamid* had alluded to special factors to be taken into consideration in the particular circumstances of individual cases. We therefore, in the end, found the balance of convenience tipped heavily against the seller, and we unanimously agreed that the interlocutory injunction granted ex parte and continued inter partes by the learned judge in favour of the seller, should be discharged, hence the appeal was allowed.

[28] In the Court of Appeal case of *Kejuruteraan Bintai Kindenko Sdn Bhd v Nam Fatt Construction Sdn Bhd & Anor* [2011] 7 CLJ 442, Ramly Ali JCA (later FCJ) held as follows in respect of restraining the beneficiary from receiving the monies under the performance bond with emphasis added by me:

[76] *The existence of the performance bonds in dispute arose from the contractual relationship between the beneficiary (1st respondent) and the appellant where the 1st respondent was the main contractor and the appellant was a sub-contractor for the project for the Construction of the Integrated Customs, Immigration and Quarantine Complex in Johor Bahru. Their contractual relationship is governed by the underlying contract between them.*

[77] The appellant was a sub-contractor for the project's two components, namely the mechanical and electrical works packages, with a total central value of RM100m.

[78] *The two performance bonds were issued pursuant to cl 24 of the underlying contract whereby the appellant as the nominated subcontractor shall as a condition precedent to the commencement of works under the underlying contract, deposit with the 1st respondent as the main contractor a performance bond equal to 5% of the subcontract sum for the due observance and performance of the underlying contract. Clause 24(c) of the underlying contract provides*:

> (c) *if the Nominated Sub-contractor fails to execute the Sub-contract or commits breach of its obligations under this Sub-contract, the Contractor may utilise and make payments out of or deductions from the said Performance Bond, provided that the Contractor shall not be entitled to utilise such Performance Bond unless the Employer shall have issued to the Contractor (with a duplicate copy to the Nominated Sub-contractor) a certificate in writing stating in his opinion that the Nominated Sub-contractor has been in default as aforesaid.*

[79] *Thus, under cl 24, of the underlying contract, the beneficiary (the 1st respondent) is only entitled to utilise the performance bonds if the nominated subcontractor (the appellant) fails to execute the contract or commits a breach of its obligations under the contract with one precondition which must first be fulfilled ie, that the Employer (Gerbang Perdana Sdn Bhd — GPSB) shall have issued to the 1st respondent (with a duplicate copy to the appellant) a certificate in writing stating its opinion that the appellant has been in default. This precondition must be fulfilled before the beneficiary is entitled to make any call or demand on the said performance bonds. Unfortunately, in the present case, there is no evidence of any certificate issued by GPSB for that purpose. Therefore, under the underlying contract, the beneficiary is not entitled to make any*

demand on both the performance bonds. The demands are premature and they must be restrained from making such demands.

[80] The Supreme Court in ESSO Petroleum Malaysia did not restrain the court from issuing injunctive order restraining the beneficiary from making a demand or call on a performance bond in appropriate cases. Peh Swee Chin, FCJ in that case has indicated clearly that:

> The right of the seller to the ancillary relief of an interlocutory injunction could arise out of such alleged invasion of the right of the seller ie, the plaintiff, by the buyer, ie, the defendant, under the said contracts between the seller and the buyer. Therefore, despite the resulting effect that it would restrain Bank Bumiputra, it could not prevent the seller from applying for an interlocutory injunction.

[81] *There was nothing to suggest in that case (Esso Petroleum Malaysia) that fraud was the only ground to restrain the beneficiary from making a demand or call on a performance bond. There was also nothing to suggest that unconscionable conduct on the part of the beneficiary in making a demand or call cannot be a separate ground to restrain him from doing so. In fact, in that case, the Supreme Court applied the American Cynamid principle and found that the balance of convenience tipped heavily against the seller (the beneficiary) and the remedy of the seller as plaintiff would be in damages. The interlocutory injunction granted by the trial court (in that case) in favour of the seller was discharged by the Supreme Court on the balance of convenience, without touching on the ground of 'unconscionability' at all.*

...

[89] In this regard, this court is in full agreement with Varghese George, JC in the case of *Tidalmarine Engineering Sdn Bhd v Kerajaan Malaysia* [2010] 1 LNS 1361 (unreported) where he said:

> The law in our jurisdiction might not be clear on 'unconscionability' as a separate exception to the strict obligation to pay or receive monies when it involves on-demand/unconditional bonds or guarantees. There has been some resistance to extend the position in Singapore laid out in Bocotra's case to our shores.

This is often attributed to one sentence in our Court of Appeal decision in *LEC Contractors* which reads:

> *Bad faith or unconscionable conduct by itself is not fraud.*

As I have noted in another decision of mine (Sumatec Engineering and Construction Sdn Bhd v Malaysian Refining Company Sdn Bhd) our Court of Appeal may appear, at first glance by that sentence, to be averse to 'unconscionability' being received or adopted here as a distinct ground for the court's intervention. However I would beg to state, on a full reading of that decision, that the focus of the learned judges appear to be on what constituted or did not constitute 'fraud' and whether it was pleaded in that particular case. As is accepted in law, 'fraud' would no doubt encompass some element of 'criminality' or deceit. 'Unconscionability' on the other hand, would not necessarily always amount to 'criminal' acts. I am of the view that there is no justification, in

principle or policy, why the same assistance of the court should be withheld from a party who approaches the court for intervention on the grounds of 'unconscionability' or mala fide acts on the part of the beneficiary, which if refused, could result in similar or more severe damage and loss to the aggrieved party than would happen in a 'fraud' context.

[90] This court is also in agreement with Mohamad Ariff, J in *Focal Asia Sdn Bhd & Anor v Raja Noraini bt Raja Datuk Nong Chik & Anor* [2009] 1 LNS 913 where his Lordship made the following observations:

> The Singapore Court of Appeal in Bocotra ... accepted the legal position that the court will grant an interlocutory injunction restraining a beneficiary from calling on the bond on the ground of fraud or unconscionability.
>
> In my view, the judicial and extra-judicial views expressed in Singapore accord with good commercial sense and unless precluded by higher authority and the doctrine of precedent, I am of the opinion that this viewpoint should be followed and adopted in Malaysia.

[91] On the above authorities, this court is of the view that the principle recognising 'unconscionability' as a separate and distinct ground to restrain a beneficiary from making a demand or call on a performance bond, as adopted by the Singapore Court of Appeal case of *Bocotra Construction* accord with good commercial sense and appears to be a sound principle; and therefore should be followed and adopted by the courts in Malaysia.

...

[93] *We all agree that performance bonds are used frequently in the construction industry as well as trade transactions locally as well as internationally. They are provided by and to parties who deal at arm's length. The court should give effect to the intention of the parties. The law in relation to performance bonds should be placed on a clear and unambiguous footing so that they could be accepted by parties in Malaysia or at international level. Parties should not be allowed to take advantage of one another in making a demand or call on the performance bond particularly when they are not entitled to do so. It must be stressed that a performance bond can operate as an oppressive instrument and a demand or call by a beneficiary can sometimes be abusive. In the event that a beneficiary calls on the bond in circumstances where there is prima facie evidence of fraud or unconscionable conduct, the court should step in to intervene at the interlocutory stage to avoid further injustice to the other party. As has been expressed by the Court of Appeal in GHL Pte Ltd v Unitrack Building Construction Pte Ltd & Anor, 'we agree that a beneficiary under a performance bond should be protected as to the integrity of the security he has in case of non-performance by the party on whose account the performance bond was issued, but a temporary restraining order does not prejudice or adversely affect the security it merely postpones the realisation of the security until the party concerned is given an opportunity to prove his case.*

Standard of Proof Required

[94] *In order to rely on the ground of 'unconscionability' to restrain an abusive call or demand made by a beneficiary on a performance bond, as a distinct and separate one apart from fraud, there must be placed before the court manifest or strong evidence of some degree in respect of the alleged unconscionable conduct complained of, not a bare*

statement. In this respect this court agrees with the learned High Court judge in his findings that 'hence, the plaintiff has to satisfy the threshold of a seriously arguable case that the only realistic inference is the existence of fraud or unconscionability which would basically mean establishing a strong prima facie case, at least at the interlocutory stage.' The plaintiff has to place sufficient evidence before the court so as to enable the court to be satisfied, not necessarily beyond reasonable doubt, that a case of 'unconscionability' being committed by the beneficiary has been established to an extent sufficient for the court to be minded to order the injunction sought. This additional ground should only be allowed with circumspect where events or conduct are of such degree such as to prick the conscience of a reasonable and sensible man.

[29] Subsequently in the Federal Court case of *Sumatec Engineering and Construction Sdn Bhd v Malaysian Refining Co Sdn Bhd* [2012] 4 MLJ 1; [2012] 3 CLJ 401, Abdull Hamid Embong FCJ held as follows with emphasis added by me:

> [16] The Court of Appeal however disagreed with the High Court in concluding that MRC had acted unconscionably. The learned judges of appeal accepted that unconscionability can be an exception. Their Lordships however came to a finding of facts that, in the instant case, Sumatec had failed to adduce sufficient evidence of unconscionable conduct on the part of MRC in making the call on the bank guarantee.
>
> [17] The Court of Appeal used the following tests and principles in coming to its conclusion, in determining the issue at hand as found in the following passages from its judgment:
>
> (i) *The principle concerning 'unconscionability' was initially propounded by Lord Denning in the case of Lloyds Bank v Bundy* [1975] QB 326 *where it was held that unconscionable transaction between parties may be set aside by the court of equity. This 'unconscionable' category is said to extend to all cases where unfair advantage has been gained by an unconscientious use of power by a stronger party against a weaker* (see also *Halsbury's Law of England*, 3rd Ed, Vol 17 [1956] at p 682).
>
> (ii) *On an application for relief against unconscionable conduct, the court looks to the conduct of the party attempting to enforce, or retain benefit of, a dealing with a person under a special disability in circumstances where it is not consistent with equity or good conscience that he should do so* (see *Commercial Bank of Australia Ltd v Amadio and Another* [1983] 46 ALR 402).
>
> (iii) In the Singapore High Court, Lai Kew Chai J in the case of *Min Thai Holdings Pte Ltd v Suniable Pte Ltd & Anor* [1999] 2 SLR 368 opined that '*the concept of unconscionability involves unfairness, as distinct from dishonesty or fraud, or conduct so reprehensible or lacking in good faith that a court of conscience would either restrain the party or refuse to assist the party*'.
>
> (iv) *It is not possible to define 'unconscionability' other than to give some very broad indications such as lack of bona fides. What kind of situation would constitute 'unconscionability' would have to depend on the facts of each case. This is a question which the court has to consider on each occasion where its jurisdiction*

is invoked. There is no pre-determined categorization (see *Dauphin Offshore Engineering and Trading Pte Ltd v The Private Office of HRH Sheikh Sultan bin Khadifa bin Zayed Al-Nahyan* [2000] 1 SLR (R) 117; and *Shanghai Electric Group Co Ltd v PT Merak Energi Indonesia* [2010] 2 SLR 329)

(v) *Based on the above considerations, we are of the view that there is no simple formula that would enable the court to ascertain whether a party had acted unconscionably in making a call on an on-demand performance bond or bank guarantee. In the final analysis, whether or not 'unconscionability' has been made out is largely dependent on the facts of each case. In every case where 'unconscionability' is made out, there would always be an element of unfairness or some form of conduct which appears to be performed in bad faith.*

(vi) In *Bocotra Construction Pte Ltd v AG* [1995] 2 SLR (R) 262, the Singapore Court of Appeal, stated that *'a higher degree of strictness applies, as the applicant will be required to establish a clear case of fraud or unconscionability in the interlocutory proceedings. It is clear that mere allegations are insufficient'.*

[18] Of the various propositions on the concept of unconscionability that emerged from the case authorities adverted to in the judgment of the Court of Appeal, three entrenched principles may be discerned, as observed by Kartigesu JA speaking for the Singapore Court of Appeal in *Bocotra*. They are:

(a) The autonomy principle — the guarantee constitutes a separate contract from the underlying transaction between the account party and the beneficiary; its privity being only between the beneficiary and the issuing bank.

(b) The 'cash in hand' principle — reflecting the importance of promoting commercial efficacy and certainty in the use of letters (of credit) guarantees and bonds. This ties in with the autonomy principle.

(c) The 'fraud' exception — the sole exception to the autonomy and cash in hand principles arises where the plaintiff can establish fraud in the circumstances of the call or payment. This permits injunctive relief.

[19] *The fundamental principle behind a bank guarantee is that it is separate and independent of the underlying contract between the disputing immediate parties and the contract between the account party and the bank.* Thus in this case, MRC could, relying on this autonomy principle, call upon BIMB to make payment on the bank guarantee at any time and without proof of any breaches arising from the underlying contract.

...

[25] *Unconscionability as an added and distinct exception to restrain payments in on demand guarantees has lately made some inroad into some common law jurisdictions.* Thus in Singapore some authorities, notably *Bocotra*, unconscionability was introduced seemingly as an additional ground for restraining a call or payment on a bank guarantee although the concept was not accorded a full discussion in that case. One view as observed by Hang Yen Low in his very useful article entitled '*Unconscionability As A Ground For Withholding Payment In Demand Guarantees:*

Should The Exception Be Extended To Letters Of Credit? [2008] 1 MLJ clxxxiii' is that since unconscionability and fraud are terms used interchangeably in *Bocatra* and that the court did not investigate the facts relating to the underlying contract the judgment 'was specifically tailored to dispel the notion that fraud was not the sole ground for an interim injunction'. Thus it would seem that Bocatra does not depart from the English position. This view was supported in *New Civilbuild Pte Ltd v Guobena Sdn Bhd & Another* [1999] 1 SLR 374 where the learned JC stated that:

> Given that the Court of Appeal had stated that the weight of authority had suggested that fraud as the sole exception was well entrenched, I do not understand the court as having changed the law without a discussion of the basis for it.
>
> ...
>
> [39] *We are of the considered view that the 'seriously arguable and realistic inference' test as used by the learned Judicial Commissioner in Focal Asia is equally applicable to the extended exception of unconscionability. That test therefore needs to be applied to the relevant material facts before the court. The same test which results in a 'strong prima facie case' was utilized by the Court of Appeal at the intermediate appeal stage.* And the Court of Appeal said this of the required burden now rested on the shoulders of Sumatec:
>
> > As in the case of fraud, to establish 'unconscionability' there must be placed before the court manifest or strong evidence of some degree in respect of the alleged unconscionable conduct complained of, not a bare assertion. Hence, the Respondent has to satisfy the threshold of a seriously arguable case that the only realistic inference is the existence of 'unconscionability' which would basically mean establishing a strong prima facie case. In other words, the Respondent has to place sufficient evidence before the court so as to enable the court to be satisfied, not necessarily beyond reasonable doubt, that a case of 'unconscionability' being committed by the beneficiary (the Appellant) has been established to an extent sufficient for the court to be minded to order injunction sought. This additional ground of 'unconscionability' should only be allowed with circumspect where events or conduct are of such degree such as to prick the conscience of a reasonable and sensible man.
>
> *We are in agreement with those propositions.*

(See also the recent Court of Appeal case of *Target Resources Sdn Bhd v Thp Bina Sdn Bhd* [2019] MLJU 266; [2019] 4 MLRA 544)

[30] It may thus be discerned from these case authorities that it is firstly vital to ascertain whether the bond/guarantee is an unconditional 'on-demand' bond/guarantee payable on demand simpliciter by the beneficiary or is a conditional bond/guarantee further requiring assertion or proof of the principal debtor's default by the beneficiary.

[31] Secondly, if it is an 'on-demand' bond/guarantee, the restraint against the guarantor from making the payment under the bond/guarantee is only

upon proof of fraud committed by the beneficiary. However, if it is a conditional bond/guarantee, the restraint against the guarantor from making payment under the bond/guarantee is only upon the failure of the beneficiary fulfilling the condition(s) of payout under the bond/guarantee such as non assertion of default of the principal debtor in the beneficiary's demand or absence of conclusive proof of default of the principal debtor as established by a court of law or arbitration. The requirement of assertion or proof of default is dependent on the construction of the bond/guarantee.

[32] Thirdly, irrespective of whether it is an 'on-demand' bond/guarantee or conditional bond/guarantee, the restraint against the beneficiary from receiving the payment under the bond/guarantee is either upon proof of fraud committed by the beneficiary or alternatively, if it is unconscionable of the beneficiary to receive the payment, having regard to the underlying contract and its surrounding circumstances including whether the aforesaid condition(s) of pay-out of the bond/guarantee has (have) been fulfilled.

[33] Fourthly, unconscionability is fact sensitive and the threshold of establishing unconscionability by the principal debtor is high. It must be substantiated with strong cogent evidence. Disputes between the principal debtor and the beneficiary pursuant to the underlying contract per se would not ordinarily suffice.

[34] Applying these principles, I must start off ascertaining the precise nature of the performance bond and advance payment guarantee here. It depends entirely on their wordings. On my reading of the performance bond and advance payment guarantee, I find and hold that they are both conditional bonds and guarantees akin to the bond in *Teknik Cekap Sendirian Berhad v Public Bank Berhad* at p 701 where the default of the plaintiff has to be asserted by the defendant. It is unlike the bond in *Kejuruteraan Bintai Kindenko Sdn Bhd v Nam Fatt Construction Sdn Bhd & Anor* at p 466 [73] where simply a demand for payment suffices. Consequently, it is obligatory on the defendant to assert the default in its demand on OCBC Al-Amin Bank Bhd pursuant to the performance bond and advance payment guarantee.

[35] In this regard and on my reading of the defendant's letters of demand dated 13 November 2019 and 14 November 2019 in respect of the performance bond and advance payment guarantee respectively, I find and hold that the defendant has vis a vis OCBC Al-Amin Bank Bhd satisfied the condition of having asserted the plaintiff's default in the second paragraph of both the aforesaid letters of demand.

[36] However, the plaintiff's application here is not to restrain the payment under the performance bond and advance payment guaranteee by OCBC

Al-Amin Bank Bhd but the receipt of payment thereunder by the defendant, albeit it would indirectly restrain OCBC Al-Amin Bank Bhd from pay-out.

[37] The basis of the application is interim maintenance of status quo pending the disposal of the forthcoming arbitration of the dispute on the terminated Contract between the parties pursuant to s 11 of the Arbitration Act 2005 ('the AA') that reads:

> 11 Arbitration agreement and interim measures by High Court
>
> (1) A party may, before or during arbitral proceedings, apply to a High Court for any interim measure and the High Court may make the following orders for the party to —
>
> (a) maintain or restore the status quo pending the determination of the dispute;
>
> (b) take action that would prevent or refrain from taking action that is likely to cause current or imminent harm or prejudice to the arbitral process;
>
> (c) provide a means of preserving assets out of which a subsequent award may be satisfied, whether by way of arrest of property or bail or other security pursuant to the admiralty jurisdiction of the High Court;
>
> (d) preserve evidence that may be relevant and material to the resolution of the dispute; or
>
> (e) provide security for the costs of the dispute.
>
> (2) Where a party applies to the High Court for any interim measure and an arbitral tribunal has already ruled on any matter which is relevant to the application, the High Court shall treat any findings of fact made in the course of such ruling by the arbitral tribunal as conclusive for the purposes of the application.
>
> (3) This section shall also apply in respect of an international arbitration, where the seat of arbitration is not in Malaysia.

[38] In *Malaysian Resources Corporation Berhad v HSBC Bank Malaysia Bhd & Ors and Another Case* [2019] 1 LNS 1158, Lee Swee Seng J (now JCA) held as follows on s 11 of the AA:

> [141] The status quo to be preserved is the monies secured in the Bond which would need to be preserved until the disposal of the arbitration. Implicit in that argument is that the beneficiary of a Bond, who is usually the defendant, would suffer no prejudice save that of interest on the sum secured under the Bond.
>
> [142] It does not stand to reason that the legislature in enacting section 11(1)(a) AA had intended a different test to be applied with respect to a call on the Bond or to restrain the receipt of the Bond sum where parties are proceeding with arbitration

compared to if there is no arbitration clause and thereby requiring them to resolve their disputes in the court.

[143] The difference between arbitration and litigation is nothing more than a difference in the mode of dispute resolution process. The issues of law remain the same. One must bear in mind that discretion is still reposed in and retained by the Court in deciding whether or not an injunction should be allowed with the intent of maintaining the status quo pending the resolution of the dispute via arbitration. The words used after all in section 11(1)(a) AA is 'The Court may ...' I do not read *Bumi Armada Navigation* as stating that once the 5 requirements are met then an injunction would invariably be granted. Rather in the nature of an injunction in the context of a pending arbitration, the 5 requirements are the irreducible minimum which must be met as threshold conditions before the court considers the test as developed by case laws relating to the particular type of injunction applied for.

[144] Certainly *Bumi Armada Navigation* is not standing for the proposition that the test for an injunction to restrain a call on a Bond is different from that laid down in *Sumatec Engineering* by the Federal Court.

[39] It is plain that the plaintiff is here relying on unconscionability solely to restrain the defendant from receiving payment under the performance bond and advance payment guarantee. Hence, the plaintiff must satisfy me that it met a strong prima facie case which pricks the conscience of a reasonable and sensible man as affirmed in *Sumatec Engineering and Construction Sdn Bhd v Malaysian Refining Company Sdn Bhd*. I also observed that in the Singapore case of *Raymond Construction Pte Ltd v Low Yang Tong & Anor* [1996] SGHC 136, Lai Kew Chai J explained unconscionability as follows:

The concept of 'unconscionability' to me involves unfairness, as distinct from dishonesty or fraud, or conduct of a kind so reprehensible or lacking in good faith that a court of conscience would either restrain the party or refuse to assist the party. Mere breaches of contract by the party in question ... would not by themselves be unconscionable.

[40] Upon my review of the affidavits adduced by the parties, they have both gone at length contending against each other on the lawfulness or otherwise of the termination of the contract. In gist, the defendant contended that the plaintiff did not carry out the work with reasonable diligence particularly in accordance with the revised schedule set out in the supplementary agreement whereas the plaintiff counter-contended that they were prevented from doing so by the defendant particularly due to non payment by the defendant in accordance with the contract and supplementary agreement.

[41] These contentions and counter-contentions are to me cross allegations of breaches of contract which have to be dealt with by the arbitrator in their forthcoming arbitration proceedings. For purposes of this application, they are merely contractual disputes and differences between them and cannot per se

constitute unconscionability on the part of the defendant as seen in *Itramas Technology Sdn Bhd v AmBank (M) Berhad and Anor* [2009] MLJU 855; [2009] AMEJ 0094 and *Malaysian Resources Corporation Berhad v HSBC Bank Malaysia Bhd & Ors and another case* (see also *Bina Mekar Sdn Bhd v Director of Irrigation and Drainage & Ors* [2016] MLJU 1513; [2016] 1 LNS 1722, *Daya CMT Sdn Bhd v Yuk Tung Construction Sdn Bhd* [2016] MLJU 352; [2016] 1 LNS 649 and *Chengaljati Sdn Bhd v Turnpike Synergy Sdn Bhd & Ors* [2019] MLJU 1114; [2019] 1 LNS 549). In other words, they are neutral save for the acknowledgement that there are serious issues to be tried in the arbitration proceedings.

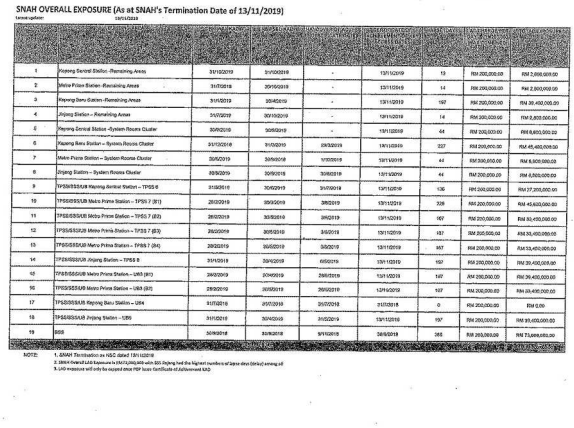
[42] That notwithstanding, the parties are nonetheless subject to and bound by the terms of the underlying contract on the utilisation of the performance bond and advance payment guarantee. They are cll 25.2(a) and 26.7 of the contract respectively. By these provisions, it has been plainly expressed that the defendant cannot utilise the payments under the performance bond and advance payment guarantee without the PDP's issuance of a written certificate to the defendant with a copy extended to the plaintiff that the plaintiff has defaulted in its obligation under the contract pursuant to cll 25.1 and 26.6 of the contract respectively. There is no evidence before me of any written certificate issued by the PDP for these purposes.

[43] Both these clauses are nearly identical to cl 24(c) of the underlying contract in the case of *Kejuruteraan Bintai Kindenko Sdn Bhd v Nam Fatt Construction Sdn Bhd & Anor*. It was held by the Court of Appeal there that the certificate is a condition precedent to the right to demand against the performance bond; thus the demand is premature in the absence of the certificate. The position is therefore no different here in respect of the defendant's demand against the performance bond as well as the advance payment guarantee. Put simply, both the demands of the defendant are premature and accordingly invalid. I am mindful that the defendant has contended that both cll 25.2(a) and 26.7 merely prevented the defendant from utilising the encashed monies but not the encashment of the payment itself without citing any case authority in support. However, I find and hold that this proposition is artificial and manifestly unfair because the plaintiff would otherwise be prejudiced for having to indemnify OCBC Al-Amin Bank Bhd for the pay-out under both the performance bond and advance payment guarantee. I am in any event bound by the interpretation of those contractual provisions as made by the Court of Appeal in *Kejuruteraan Bintai Kindenko Sdn Bhd v Nam Fatt Construction Sdn Bhd & Anor*.

[44] Be that as it may and as acknowledged by both the parties, the defendant is owing the plaintiff the overdue sum of RM15,105,446.70 for unpaid interim certificates 27 to 29 under the contract as well as the further

sum of RM668,533.50 for uncertified claims pursuant to the supplementary agreement as at the termination of the contract. They totalled to RM15,773,980.20.

[45] On the other side, the defendant claimed that it is entitled to set off from the performance bond liquidated and ascertained damages for anticipated non fulfilment of key dates under the works contract of RM73m tabulated as follows:



SNAH OVERALL EXPOSURE (As at SNAH's Termination Date of 13/11/2019)

1	Kajang Sentral Station -Remaining Areas	31/10/2019	31/10/2019	-	13/11/2019	13	RM 200,000.00	RM 2,600,000.00
2	Metro Prima Station -Remaining Areas	31/7/2019	30/9/2019	-	13/11/2019	14	RM 200,000.00	RM 2,800,000.00
3	Kajang Baru Station -Remaining Areas	31/10/2019	30/4/2019	-	13/11/2019	197	RM 200,000.00	RM 39,400,000.00
4	Jinjang Station – Remaining Areas	31/7/2019	30/10/2019	-	13/11/2019	14	RM 200,000.00	RM 2,800,000.00
5	Kajang Sentral Station -System Rooms Cluster	30/9/2019	30/9/2019	-	13/11/2019	44	RM 200,000.00	RM 8,800,000.00
6	Kajang Baru Station – System Rooms Cluster	31/10/2019	31/10/2019	30/9/2019	13/11/2019	227	RM 200,000.00	RM 45,400,000.00
7	Metro Prima Station – System Rooms Cluster	30/6/2019	30/9/2019	1/10/2019	13/11/2019	44	RM 200,000.00	RM 8,800,000.00
8	Jinjang Station – System Rooms Cluster	30/9/2019	30/9/2019	30/9/2019	13/11/2019	44	RM 200,000.00	RM 8,800,000.00
9	TPS0/SS01/JB Kajang Sentral Station – TPS5 6	31/08/2019	30/9/2019	31/10/2019	13/11/2019	136	RM 200,000.00	RM 27,200,000.00
10	TPS0/SS01/JB Metro Prima Station – TPS5 7 (B1)	28/2/2019	30/9/2019	30/2/19	13/11/2019	309	RM 200,000.00	RM 45,600,000.00
11	TPS0/SS01/JB Metro Prima Station – TPS5 7 (B2)	28/2/2019	30/9/2019	30/2/19	13/11/2019	197	RM 200,000.00	RM 39,400,000.00
12	TPS0/SS01/JB Metro Prima Station – TPS5 7 (B3)	28/2/2019	30/9/2019	30/2/19	13/11/2019	197	RM 200,000.00	RM 39,400,000.00
13	TPS0/SS01/JB Metro Prima Station – TPS5 7 (B4)	28/2/2019	30/9/2019	30/2/19	13/11/2019	197	RM 200,000.00	RM 39,400,000.00
14	TPS0/SS01/JB Jinjang Station – TPS5 8	31/10/2019	30/4/2019	60/2019	13/11/2019	197	RM 200,000.00	RM 39,400,000.00
15	TPS0/SS01/JB Metro Prima Station – UB5 (B1)	28/2/2019	30/4/2019	29/5/2019	13/11/2019	197	RM 200,000.00	RM 39,400,000.00
16	TPS0/SS01/JB Metro Prima Station – UB5 (B2)	28/2/2019	30/9/2019	29/5/2019	13/11/2019	197	RM 200,000.00	RM 39,400,000.00
17	TPS0/SS01/JB Kajang Baru Station – UB4	31/7/2019	0/7/2019	0/7/2019	31/7/2019	0	RM 200,000.00	RM 0.00
18	TPS0/SS01/JB Jinjang Station – UB6	31/10/2019	30/4/2019	31/5/2019	13/11/2019	197	RM 200,000.00	RM 39,400,000.00
19	###	30/9/2019	30/9/2019	9/11/2019	30/9/2019	365	RM 200,000.00	RM 73,000,000.00

NOTE:
1. SNAH Termination on HOC dated 19/11/2019
2. SNAH Overall LAD Exposure is (RM73,000,000 with 365 Jinjang had the highest numbers of 365 days delay) among all
3. LAD exposure will only be expired once PDP issue Certificate of Achievement (CA)

653

8

[46] On careful review of the tabulation, I however find and hold that that is merely an arbitrary and speculative estimate of the defendant's potential liquidated and ascertained damages payable by the defendant to the PDP. It assumes that the plaintiff is liable for them to the defendant in entirety. Moreover, the individual items in the tabulation seem to me to be overlapping as well. In my opinion, the tabulation is too simplistic and lacking in cogency to substantiate such massive damages set off. I am aware that the defendant has exhibited warning correspondences issued by the PDP to the defendant threatening the imposition of liquidated and ascertained damages but they are in my view per se inadequate to justify the defendant's set off. It is therefore sensible that the contract has the specific provision in cl 25.2(a) requiring the PDP's certification before monies under the performance bond may be utilised to avoid unjustified claims by the defendant against the plaintiff such as for late completion of work where the delay could have in fact been caused or contributed by the defendant itself.

[47] Furthermore, I am mindful that the defendant has contended that the plaintiff has conceded and admitted to liability to the defendant for liquidated

and ascertained damages of RM24.4m stated in Appendix B of the plaintiff's letter to the defendant dated 29 August 2019. Again on careful reading of the letter, I however find and hold that there was no such concession and admission as alleged by the defendant. Read in its proper context, the plaintiff was relying only on the contents of the remarks column of the aforesaid Appendix B but not the sum of RM24.4m. It is uncertain who inserted this sum.

[48] The defendant has also contended that there is the sum of RM8,045,173.71 of un-recouped advance payment that was already disbursed to the plaintiff and this sum ought to be recovered from the advance payment guarantee.

[49] On the other side, the plaintiff did not dispute the sum of RM8,045,173.71 that was un-recouped but the plaintiff counter contended that this was caused by the premature termination of the contract by the defendant. The recoupment would have been totally recovered by the defendant if the plaintiff had the opportunity to complete the works under the contract.

[50] In the Singapore case of *Raymond Construction Pte Ltd v Low Yang Tong & Anor*, it was held to be unconscionable in respect of a demand of S$26,158.70 for alleged defective work under the performance guarantee for the sum of S$40,419.05 by the employer for alleged defective work when the contractor was owed S$229,417 or about 30% of the contract sum due to the employer's prevention of the architect issuing an interim certificate to the contractor. Similarly, the equitable jurisdiction was exercised in the earlier Singapore case of *Royal Design Studio Pte Ltd v Chang Development Pte Ltd* [1990] SLR 1116 when the employer called on the performance bond notwithstanding that it was in default by refusing to pay the agreed upon interim payments when the building contractor had substantially fulfilled its obligations. In addition, the director of the building contractor provided a personal guarantee and the employer also held a considerable sum of money from sale of properties in which the building contractor had equitable interest.

[51] It may therefore be concluded that over-securitisation as the result of the beneficiary demanding upon the bond/guarantee is unconscionable. This court shared a similar concern in *Daya CMT Sdn Bhd v Yuk Tung Construction Sdn Bhd*. In the circumstances here, the defendant owed the plaintiff the sum of RM15,773,980.20. The only tangible sum arguably recoverable by the defendant for un-recouped advance payment is merely RM8,045,173.71. The other alleged right of the defendant to recover and be secured for potential liquidated and ascertained damages is overly arbitrary and speculative as claimed. It is presently unquantifiable and must hence accordingly be discarded. Consequently, it is manifestly unfair without justification for the

defendant to demand either upon the performance bond or advance payment guarantee because the amount owing by the defendant to the plaintiff is already adequate to safeguard the defendant's financial exposure as disclosed pending the disposal of the arbitration proceedings between the parties.

[52] The balance of convenience thus favours the plaintiff to restrain the defendant from receiving monies either under the performance bond or advance payment guarantee in preservation of the status quo. It is otherwise unconscionable.

[53] In the absence of the PDP's certificate(s) issued pursuant to cll 25.2(a) and 26.7 of the contract and since the disputes and differences have been referred to arbitration proceedings, the defendant must necessarily wait for the affirmation of the arbitrator in his/her award before the monies under the performance bond and advance payment guarantee can be encashed.

CONCLUSION

[54] For the foregoing reasons, I therefore allow the application in terms of prayers (1)–(4) with costs of RM15,000 subject to 4% allocator.

Appliaction allowed with costs of RM15,000 subject to 4% allocator.

Reported by Ashok Kumar